89-283 (1)

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1989

AMY TRAVEL SERVICES, INC. et al.	§	
Petitioners	§	
v.	§	NO. _____
FEDERAL TRADE COMMISSION	§	
Respondent	§	

Appeal from the United States
Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORI

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ATTORNEYS FOR PETITIONERS,
AMY TRAVEL SERVICE, INC.
RESORT PERFORMANCE, INC.,
RESORT TELEMARKETING, INC.
MARKETING, INC., THOMAS P.
McCANN, II, JAMES F. WEILAND

79 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE SEVENTH CIRCUIT ERRED IN HOLDING THAT THE F.T.C. HAD STATUTORY AUTHORITY TO SEEK AND THAT THE MAGISTRATE HAD AUTHORITY TO GRANT RELIEF OTHER THAN A PERMANENT INJUNCTION.

II. WHETHER THE SEVENTH CIRCUIT ERRED IN HOLDING THAT THE DISTRICT COURT CORRECTLY ADJUDGED THE INDIVIDUAL PETITIONERS LIABLE.

A. WHETHER THE DISTRICT COURT APPLIED AN ERRONEOUS STANDARD OF INDIVIDUAL LIABILITY

B. WHETHER THE DISTRICT COURT MISAPPLIED THE STANDARD OF LIABILITY TO THE FACTS

C. WHETHER THE DISTRICT COURT'S FINDINGS OF FACT SUPPORTING THE JUDGMENT ARE CLEARLY ERRONEOUS

III. WHETHER THE SEVENTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S EXCLUSION OF THE TESTIMONY OF PETITIONER'S RELIANCE ON COUNSEL.

LIST OF PARTIES

1. Amy Travel Service, Inc.

2. Resort Performance, Inc.

3. Resort Telemarketing, Inc.

4. Thomas P. McCann, II

5. James F. Weiland

There are no parent companies, affiliates, or non wholly-owned subsidiaries.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

STATUTES FOR REVIEW

1. 15 U.S.C. §53

2. 15 U.S.C. §57b

(Copies of these statutes are contained in the Appendix).

REFERENCE TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit for the case below is reported as FTC v. Amy Travel, No. 88-1977, slip op. (7th Cir. April 19, 1989) and a copy is contained in the Appendix to this Petition.

The District Court did not issue an opinion. The District Court's Findings of Fact and Conclusions of Law are contained in the Appendix.

STATEMENT OF JURISDICTION AND BASIS OF JURISDICTION BELOW

Petitioners Resort Performance, Inc. and Amy Travel Service are Illinois corporations with principal places of business in Naperville, Illinois; Resort Telemarketing, Inc., is an Indiana

corporation with principal place of business in Indianapolis, Indiana. Petitioners James F. Weiland is a citizen of Illinois and Thomas P. McCann, II is a citizen of Indiana.

The District Court had jurisdiction of this case pursuant to 28 USC §§1331, 1337(a) 1345, 15 USC §§53(b) and 1607. The United States Court of Appeals for the Seventh Circuit had jurisdiction of this case pursuant to 28 USC §1291. This is an appeal from the District Court's final judgment granting a permanent injunction, restitution of monies, rescission of contracts and the imposition of personal liability on the individual Petitioners James F. Weiland and Thomas P. McCann, pursuant to 15 USC §52.

The District Court's judgment was entered on May 4, 1988 and a final monetary judgment requiring the Petitioners to pay $6,629,100.00 was entered on June 29, 1988. The case was timely appealed to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit affirmed the judgment of the District Court in its opinion decided on April 19, 1989, a true copy of which is contained in the appendix to this petition. The Supreme Court has jurisdiction of this case by writ of certiorari pursuant to 28 USC §1254.

STATEMENT OF THE CASE

The Petitioners in this case are three corporations and two individuals. The corporations are Resort Telemarketing ("RTI"), Resort Performance ("RPI"),

and Amy Travel Service, Inc. ("Amy"). The individuals are Thomas P. McCann, II and James F. Weiland. Thomas P. McCann, II ("Tom McCann") and James F. Weiland ("Jim Weiland") were the directors and owners of the corporations. The companies marketed discount vacations through their company by selling a vacation certificate ("passport").

RPI was incorporated in Illinois in September 1985 to market vacation certificates and was located in Naperville, Illinois. (T.15P.612).[1] RTI was

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[1]T.15P.612 - This shorthand will be used throughout the brief for citations to the record. The "T" stands for transcript, "15" is the date of the hearing in December, "P" is for P.M. ("A" will designate the A.M. session)
(Footnote Continued)

incorporated under the laws of Indiana in June 1986 to telemarket the vacation certificates and was principally located in Indianapolis, Indiana. (T.15P.617). Amy was incorporated under the laws of Illinois as a travel agency and was purchased by Petitioners to arrange trips for purchasers of the vacation certificates. (T.14A.372).

Together, these defendant companies along with other marketing companies in Texas, Colorado, Illinois, and Kentucky offered a vacation package to retail and wholesale purchasers. Telemarketers

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(Footnote Continued)
and "612" is the page. Therefore, this citation is to page 612 of the transcript for the afternoon of December 15, 1987.

sold the vacation certificate for between $289 and $329. (T.13P.348, T15A524) This certificate allowed consumers to book discount vacations through Amy at a guaranteed price which was less than the amount charged for one round-trip, year-round, unrestricted, full economy, Y-class airfare. (T.15A.-501, T.15P.613). For this price, consumers would receive plane tickets and hotel vouchers for 8 days and 7 nights at a variety of popular vacation spots. (T.14A.340). The actual cost to Amy depended on season and variability of wholesale rates and could not be given during the sales call. (T.15A.518, T.16P.813).

The Defendants' profit was made on the sale of the certificates instead of

the normal percentage increase used by other travel agents. Operationally, Amy was managed by: (1) Cecilia Pradhan, who was responsible for all customer travel arrangements, (2) Tom McCann was responsible for marketing operations, and (3) Jim Weiland oversaw business in general. (T.15P.651,652, T.16P.870).

The FTC filed a complaint for a temporary restraining order and preliminary injunction on August 3, 1987 and the temporary restraining order was issued that day. The complaint alleged four counts of deceptive and unfair trade practices under sections 5(a) and 13(b) of the Federal Trade Commission

Act.[2] Count I alleges that Petitioners represented to purchasers that they were entitled to fully paid vacations, including roundtrip airfare and hotel lodging for eight days and seven nights for the price of the vacation passport alone. Count II alleges that Petitioners represented to consumers that the only additional cost for the package was "one standard, all year, full economy (Y-class) airfare", which was false because Y-class is the highest priced coach fare. Count III alleged that Petitioners represented that they needed consumer's credit card numbers solely to

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[2]Sections 5(a) and 13(b) of the FTC Act are the same as U.S.C. §§45, 53(b).

verify them when instead consumers were charged for the vacation passport. Count IV alleges that Petitioners represented that consumers would not be billed, when they were billed.

The District Court entered the Final Order of Permanent Injunction and Restitution ("Final Order") on May 4, 1988. It ordered Petitioners to pay, jointly and severally, $6,629,100.00 in redress for restitution and rescission and enjoined them from selling or marketing vacation packages, among other things.

The Final Order of the District Court was affirmed by the United States Court of Appeals for the Seventh Circuit in its opinion, FTC v. Amy Travel, No. 88-1997, (71h Cir. April 19, 1989), a

copy of which is contained in the Appendix.

ARGUMENT

ISSUE I: WHETHER THE SEVENTH CIRCUIT ERRED IN HOLDING THAT THE FTC HAD STATUTORY AUTHORITY TO SEEK AND THE MAGISTRATE HAD AUTHORITY TO GRANT RELIEF OTHER THAN PERMANENT INJUNCTION.

Section 53(b) of the Act[3] provides in part as follows:

> Provided further, that in proper cases the Commission may seek and after proper proof, the court may issue, a

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[3] In the discussion of the FTC Act, sometimes the numbering of sections can be confusing. Some cases refer to the section number of the FTC Act itself, while others refer to the section of the FTC Act as embodied in the U.S.C. For reference, generally three sections are constantly referred to herein. Section 5 of the FTC Act is §45 of the U.S.C.; §13 of the FTC Act is §53 of the U.S.C.; and §19 of the FTC Act is §57 of the U.S.C.

> permanent injunction. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

15 U.S.C. §53(b) (1976) (emphasis added).

In the emphasized portion of the statute (which will herein be called the "Permanent Injunction Proviso" or simply the "Proviso"), it is evident that the statute by its terms states only that the FTC may seek, and a district court grant, permanent injunctions, and does not state that a court in so hearing a case for permanent injunction may apply all equitable powers which would otherwise be available. Nevertheless, the FTC in this case sought and obtained not only a permanent injunction, but also received other equitable remedies as

well, such as (i) rescission of contracts[4]; (ii) restitution of amounts to customers; and (iii) the imposition of personal liability on the shareholders of the Petitioner corporations (herein sometimes referred to as the "Individual Petitioners"). The question of whether the FTC has statutory authority under Section 53(b) of the Act to seek rescission, restitution, and the imposition of personal liability in connection with a permanent injunction action and whether a district court has jurisdiction to

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[4]While "rescission" is not technically referred to in the court's order, in ordering restitution of monies to consumers, rescission of contracts wherein such monies were obtained is implicit.

grant such relief has been specifically addressed by only the Seventh and Ninth Circuits which have answered that question in the affirmative. See e.g., FTC v. Amy Travel, No. 88-1997, slip op. at 13-14 (7th Cir. April 19, 1989), and FTC v. H. N. Singer, Inc., 668 F.2d 1107, 1113 (9th Cir. 1982).[5] This

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[5] See FF (Findings of Fact) 22. The Magistrate also relied on the case of FTC v. U.S. Oil & Gas Corporation, 748 F.2d 1431 (11th Cir. 1984), which in a very brief per curiam opinion agrees with the Ninth Circuit's conclusions in Singer, although with little substantive analysis, and FTC v. Southwest Sunsites, Inc., 665 F.2d 711 (5th Cir. 1982), wherein court held that the first proviso of §53(b), authorizing preliminary injunctions pending issuance of administrative complaints, authorized a grant of ancillary equitable relief under the "doctrine of inherent equitable jurisdiction." Id. at 721. See (FF 22).

issue, however, is one of first impression for the Supreme Court. It will be shown that the Circuit Courts have erred in their construction of the statutes.

The issue is twofold. First it must be determined whether the FTC in connection with seeking a permanent injunction under Section 53(b) has statutory authority to additionally seek the equitable remedies of rescission and restitution. The FTC is an administrative agency which is limited to those specific powers which Congress has expressly granted it. Second, it must be determined whether Section 53(b), by an inescapable inference, limits the equitable jurisdiction of the district court.

Section 53(b) does not explicitly or implicitly grant the FTC authority to seek restitution and rescission in connection with a permanent injunction action. Such remedies are not necessary to implement or maintain the integrity of the injunctive relief which the FTC is expressly granted authority to seek. If the FTC is to pursue the equitable remedies of rescission and restitution, it must do so pursuant to the requirements of Section 57b where such authority is expressly granted.

The decisions cited by the FTC are directed towards the issue of whether Section 53 prohibits the district court from granting various kinds of equitable relief in addition to a permanent injunction. These decisions do not

address the threshold issue of whether Congress has authorized the FTC to seek rescission and restitution apart from the procedures contained in Section 57b. There simply is no provision for the FTC to obtain these remedies under Section 53.

Additionally, when the FTC seeks a permanent injunction pursuant to the procedures of Section 53, the statute by inference limits the jurisdiction of the district court to grant only that remedy. An analysis of the authority to the contrary shows that it is not well founded.

In FTC v. H.N. Singer, Inc. 668 F.2d 1107 (9th Cir. 1982), the 9th Circuit found two distinctive bases upon which it concluded that the FTC had the

authority to attempt to procure a temporary injunction. One of these grounds (§57(b)) is clearly irrelevant as that section deals with violations of published FTC rules and previously entered cease and desist orders. The other ground has its basis in the interpretation of the Permanent Injunction Proviso. In Singer, the court in what was clearly dicta[6] stated that

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[6]The Ninth Circuit's reliance on this provision of §53(b) was unnecessary in light of the fact that the defendant there had violated the FTC rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunities" (668 F2d at 1109), and thus pursuant to §57(a) and (b) of the Act, the relief sought by the FTC was clearly available pursuant to these sections. It should be noted that the Appellants were not accused of violating any published FTC rule.

because §53(b) "gives the court authority to grant a permanent injunction, it also by implication gives the court authority to afford all necessary ancillary relief, including rescission of contracts and restitution. The power to enjoin is part of what used to be the jurisdiction of equity." Singer, 668 F.2d at 1112. Petitioners submit, however, that the 9th Circuit reached the wrong result. The Magistrate was incorrect in relying on Singer; a district court lacks the power to impose personal liability on individual owners, to rescind contracts and order restitution of money to consumers; a district court may only issue a permanent injunction.

A. Standard to Evaluate

In analyzing the question of whether in empowering a district court to issue permanent injunctions, Congress intended to grant district courts broad equitable powers, such as power to rescind contracts and order individuals to repay amounts, the 9th Circuit in Singer focused on a now-famous excerpt from the case of Porter v. Warren Holding Co.:

> Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. Virginian R. Co. v. System Federation, 300 U.S. 515, 552

(57 S. Ct. 592, 601, 81 L.Ed. 789). Power is thereby resident in the District Court, in exercising this jurisdiction, "to do equity and to mold each decree to the necessities of the particular case." Hecht Co. v. Bowles, 321 U.S. 321, 329 (64. S. Ct. 587, 592, 88 L.Ed. 754).

Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." Brown v. Swann, 10 Pet. 497, 503 (9 L.Ed. 508). See also Hecht Co. v. Bowles, supra, 330 (64 S. Ct. 592).

Singer, 668 F.2d at 1112 (Citing Porter v. Warren Holding Co., 328 U.S. 395,

398, 66, S.Ct. 1086, 1089, 80 L. Ed 2d 1332 (1946)).

Indeed this is the precise quotation cited by the 7th Circuit in the case of Commodity Futures Trading Commission v. Hunt, 591 F.2d 121 (7th Cir. 1979), where the 7th Circuit addressed the identical question (albeit interpreting a different statute, i.e. the Commodities Act) of whether the Commodities Act, there in question, empowered a court to bring to bear the entirety of its equitable powers, not simply its injunctive powers. As acknowledged by the 7th Circuit in Hunt, the test is whether the FTC Act "in so many words, by a necessary and inescapable inference, restricts the court's jurisdiction in equity...." Porter, 328

U.S. at 398; 66 S.Ct. at 1089. It is the contention of the Petitioners that both such limitations are present, i.e. that in so many words and by a necessary and inescapable inference, the court's equity jurisdiction is limited.

B. Statute's Precise Wording Necessitates This Conclusion

The first reason that the court should have been limited only to a trial for permanent injunction and not be permitted to bring to bear all of its equitable powers, is because the language of the statute says that permanent injunctions may be entered; it does not simply say "injunctions," which might lend itself more towards the logic of broad equitable powers. This point becomes even clearer, however, when

different cases analyzing the same question for different statutes are reviewed.

For example, the Hunt case analyzed in part the propriety of a district court's refusal to issue an order compelling defendants in that case to disgorge profits they obtained as a result of their illegal activity. Id. at 1221. The Seventh Circuit framed the issue as whether disgorgement was an appropriate form of ancillary relief in the Commodity Exchange Act context, and found the issue a "close question." Id. at 1222.

Section 6(c) of the Commodities Act provided that the Commodities Commission could bring in a district court, an action "to enjoin such act or practice,

or to enforce compliance with the chapter, or any rule, regulation or order thereunder...." 7 U.S.C. §13a-1 (1976). The Seventh Circuit noted that while this language did not expressly permit a district court to utilize all of its equitable powers, neither did such language restrict the equitable power. This, however, is not the situation in the present case, where the language of the FTC Act is very narrow:

> "Provided further, that in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction."

15 U.S.C. §53(b) (1976).

Additionally, to further substantiate the point that when Congress chose the term "permanent injunction" it was not intending to allow a district court

to exercise any and all other equitable remedies and powers available to a district court, we need only look at other provisions of the FTC Act itself where different and broader terminology is used in defining and describing various remedies and powers. This illustrates implicitly, if not explicitly, that a district court's power in this context is limited only to the issuance of a permanent injunction. For example, in §53(b) itself, just a few lines above the Proviso under scrutiny, the FTC Act provides that if the FTC Act is being violated and a cease and desist order is promptly sought, the Commission may seek to "enjoin" such acts, and in connection therewith may seek either a temporary restraining order, a temporary

injunction, or both. Certainly, the use of such terms, followed by an express provision which merely references permanent injunctions, must explicitly, if not implicitly, be read as language which should be taken at, and limited to, its express wording.

Language in other sections of the FTC Act is helpful in understanding the scope of this Proviso. For example, §57b(b) also provides that if either a cease and desist order or a promulgated rule is violated, then a permanent injunction may follow.

Again, the point must be obvious that Congress' use of the term "permanent injunction" in the Proviso was intentional and purposeful, particularly when viewed in the context of the

remainder of the statute which contains very precise statements of remedies and powers. The FTC would no doubt call attention to the final sentence in subsection (e) (quoted above) which effectively states that this section does not limit the Commission's authority under any other provision of law. Two responses to this are clear. First, as the 9th Circuit in Singer correctly pointed out, the question under scrutiny is not the Commission's authority, but a district court's. Thus, the limiting sentence in subsection (e) is irrelevant to question. Secondly, however, the proposition is here made that the language used in §57(b) indicates a precise understanding by Congress of the remedies it is granting, and Congress'

use of the "permanent injunction" language is intentional and should not be expanded.

C. The Legislative History Of §53(b) Supports The Contention Of Petitioners

Many other factors support the contentions of Petitioners. The interpretation of §53(b) given by the Seventh Circuit clearly is inconsistent with Congress' intention in passing §53(b). In the JS&A case referred to above, the 7th Circuit made reference to the legislative history of §53(b). The 7th Circuit noted that while §53(b) was originally introduced as §210 of the Senate bill (S. 356) that led to the Magnuson - Moss Act, it was enacted as part of the Trans-Alaska Pipeline Act. Quoting from that Senate Report, the 7th

Circuit observed that the intent of §53(b) was explained in this legislative history. Because this legislative history is critical to examine, that portion quoted by the 7th Circuit relevant to the Proviso is set forth as follows:

> Provision is also made in §210 for the Commission to seek and, after a hearing, for a court to grant a permanent injunction. This will allow the Commission to seek a permanent injunction when a court is reluctant to grant a temporary injunction because it cannot be assured of a [sic] early hearing on the merits. Since a permanent injunction could only be granted after such a hearing, this will assure the court of the ability to set a definite hearing date. Furthermore, the Commission will have the ability, in the routine fraud case, to merely seek a permanent injunction in those situations in which it does not desire to further expand upon the prohibitions of

> the Federal Trade Commission Act through the issuance of a cease-and-desist order. Commission resources will be better utilized, and cases can be disposed of more efficiently.

JS&A, 716 F.2d at 457 (quoting S. Rep. 93-151, 93rd Cong., 1st Sess. 30-31 (1973)).

This legislative history reveals two clear points why the interpretation adopted by the Magistrate of the FTC Act, §53(b) should be rejected. First, this legislative history makes it clear that permanent injunctions were to be sought "when a court is reluctant to grant a temporary injunction...." Clearly, if Congress' intention is to permit the issuance of permanent injunctions only when courts are reluctant to issue temporary injunctions, it

cannot be argued that Congress intended to add the additional right of district courts to hear temporary injunction matters and any and all other equitable remedies as a matter preliminary to a permanent injunction. This portion of the legislative history clearly evidences the intention of Congress to limit the applicability of the Proviso to its precise terms. Furthermore, however, the legislative history reveals that the Proviso was intended to give the FTC the right to seek a permanent injunction in those situations in which it did not desire to "further expand upon the prohibitions" of the FTC Act, which would occur otherwise if the FTC sought the issuance of a cease and desist order. In order to properly

comprehend the significance of this statement, the general procedures utilized by the FTC in the cease and desist context (discussed in detail in the following section) must be kept in mind. Thus, in this portion of the legislative history, when Congress states that the Proviso is intended to be utilized in situations in which the FTC does not desire to further expand upon the prohibitions of the FTC Act through the issuance of a complaint, which lead to a cease and desist order, it is clearly intended is that permanent injunctions are appropriate to seek in contexts in which the FTC does not desire to avail itself of the other more expansive rights which the Act specifically grants to the FTC, which are

otherwise available only through the cease and desist process. The legislative history of §53(b) itself is powerful justification for the Petitioners' position that the district court did not have its full panoply of equitable remedies available to it in deciding this case.

D. Such A Dramatic Statutory Alteration Cannot Have Been Congress' Intention

A careful review of the statutory scheme which governs the FTC as set forth in the FTC Act reveals that the Seventh Circuit's interpretation of the Proviso would not only do violence to the statutory scheme which Congress enacted, it would emasculate this scheme and directly give the FTC some of the very powers which Congress intended that

the FTC not possess. Before analyzing this, a bit of background into the statutory scheme or framework of the FTC Act is in order.

The Federal Trade Commission Act created an administrative body "to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid." Humphrie's Executor v. U.S., 295 U.S. 602, 628, 55 S. Ct. 869, 874, 79L. Ed. 1611 (1935). Pursuant to §5 of this Act (15 U.S.C. §45(a) (1976)), Congress has empowered and directed the FTC to prevent people and businesses from engaging in deceptive or unfair acts or practices which are in, or affect,

commerce. In the first fifty years of its existence, the Commission carried out this function by means of an administrative adjudicatory proceeding consisting of a complaint and a hearing before an administrative law judge, and if a violation was found, the issuance of findings of fact, along with a recommendation of a cease and desist order prohibiting future violations, was the result. The initial decision of the administrative law judge was reviewable by the Commission itself, and also was reviewable after the Commission had upheld the holding of the administrative law judge, upon petition to the appropriate Court of Appeals of the United States. The statutory framework embodied in the FTC Act provided for civil

penalties for the violation of a valid and final cease and desist order, and also provided that if the Commission satisfied a court that an act or practice to which a cease and desist order related was one which a reasonable person would have known under the circumstances was dishonest or fraudulent, relief could be granted under subsection (b) of §57b, which relief specifically empowers a court to grant whatever relief such court deems necessary to redress injury to consumers or other persons resulting from the unfair or deceptive act or practice prohibited by the cease and desist order. Specifically, §57b permits such relief to include, but not be limited to, "rescission or reformation of contracts, the

refund of money or return of property, the payment of damages, and public notification respecting the unfair or deceptive act or practice." 15 U.S.C. §57b (1976).

Courts and commentators alike have noted in the past that such a statutory procedure of having to seek a cease and desist order is in fact a cumbersome process imposed upon the FTC in dealing with unfair or deceptive acts or practices. For reasons hereinafter set out, it is apparent that the "cumbersome" procedure was intentionally devised in light of the lack of specificity and vagueness as to what constitutes "unfair or deceptive" acts or practices. This was the scheme conceived by Congress. In 1973, however,

§53 of the FTC Act was amended in part to include the Proviso. The language of the Proviso has been previously discussed and will not be repeated here. Apparently the current interpretation of the Proviso urged by the FTC was not immediately known to them upon the amendment of the Act. As the 9th Circuit pointed out in the Singer case, by 1982 the Commission had only sought in one other reported case to bring an action under the Proviso.

While the 9th Circuit correctly pointed out that failure to exercise power did not necessarily mean that the FTC lacked power, it is indicative of the fact that the FTC only then realized the argument which could be used to circumvent the otherwise cumbersome

cease and desist adjudicatory processes imposed by the statute. With this background in mind, the Petitioners offer at least three points in support of their position why the Proviso in §53(b) should not be read nearly as broadly as the FTC urges and the Magistrate has found.

The first point urged by the Petitioners in this regard is that the interpretation of §53(b) of the FTC Act sought by the FTC and adopted by the Magistrate works a tremendous foundational alteration of the statutory procedure outlined in the FTC Act. Prior to the 1973 amendments to the Act; the only method which the FTC had to seek the equitable type remedies which it has obtained here was to first obtain

a cease and desist order, after which a knowing or intentional violation of this cease and desist order would empower the FTC to seek rescission of contracts, reformation of contracts, and imposition of damages -- some of the very remedies which it has now received. In 1973, Congress acted to amend the Act in part by adding the three simple lines which embody the Proviso. The FTC argues, and the Magistrate agrees, that Congress intended to give the FTC the power to choose whether it wants to proceed with an administrative cease and desist order, or simply adjudicate the entire matter (remedies and all) in a district court. Such an interpretation cannot possibly have been intended by Congress. In fact, this position should serve to

make the whole FTC cease and desist process involving allegedly unfair or deceptive acts an anachronistic dinosaur. After all, the equitable remedies of rescission of money, reformation of contracts and things of this nature can only be received in the cease and desist process after the cease and desist order has been issued and then knowingly violated. Rather than go through this, the FTC urges, and the Magistrate has adopted, an interpretation of the Act which allows the FTC to seek the same remedies immediately through the permanent injunction vehicle. What possible motivation or rationale could the FTC have for ever again seeking a cease and desist order when the FTC can accomplish all that it desires to accomplish

through the permanent injunction procedures?

E. Adoption Of FTC's And Magistrate's Interpretation Would Itself Be Unfair

As alluded to above, the FTC Act, §45(a), which outlaws "unfair or deceptive acts," nowhere defines these terms. This lack of definition has led many to be concerned about citizens being charged with the consequences of involvement in "unfair or deceptive acts" without knowing in advance that their acts would be so held. In a fairly early case which arose in the cease and desist context, the FTC attempted to expand its statutory power (as it does here), and, in connection with a cease and desist order attempted to order a defendant to make refunds. In Heater v.

FTC, 503 F.2d 321 (9th Cir. 1974), the FTC, having found certain acts and practices to be unfair and deceptive considered that it was itself an unfair practice for the defendant to "retain moneys of which he had bilked the franchisees and members." Heater, 503 F.2d at 322. The Commission argued in that case that allowing the FTC to require refunds was "the only order that would bring the illegal conduct to an end" and thus the refunds provision of its order, the FTC urged, was manifestly within the legislative grant of broad remedial discretion. Id. The court, however, rejected this construction by the FTC of its power. The court's analysis is very relevant to the present case, where the FTC again attempts to

expand its statutory authority as it did in Heater . The court reasoned that the construction placed by the FTC upon its power to define and prohibit unfair and deceptive practices would, if accepted, operate to vest the FTC with remedial powers which were inconsistent and at variance with the overall purpose and design of the Act. Particularly, the court felt that such a construction would permit the FTC to act without proper notice. In particular, Congress rejected an amendment which provided a private damage suit based on a Commission finding of a violation of the Act." Heater, 503 F.2d at 324.

The court in Heater was emphatic in its analysis of the legislative history of the Act in pointing out that the

power to attach consequences to prior conduct was thought inconsistent with the Commission's contemplated quasi-legislative and educational function. As a result, recourse for harm suffered before the Commission entered a cease and desist order was left to private suits. The court went on to note that the impact of the refund order which the FTC sought in Heater illustrated the reason Congress did not give the Commission the power it sought to exercise. So far as it appeared from the record, the defendant in that case had received only a salary and loans (some of which loans had even been repaid) from the corporations which he controlled. The corporations which actually had received the illegal funds were bankrupt, and the

FTC order ran only as against the defendant individually. The court noted that aside from whether the defendant was legally liable to refund sums he only constructively received, those funds were expended by the corporations to pay the salaries of employees hired to service accounts and collect member charges. Any assets of the corporations would be applied towards satisfaction of judgments in private civil suits. The FTC's order, however, operated as a determination that, as between the defendant and certain innocent franchisees and members, the defendant ought in fairness to pay the losses out of his personal assets. The court felt strongly that regardless of how egregious the defendant's conduct or how unreasonable

his reliance on the legality of his operation, the FTC was not given the power to recast the consequences of conduct occurring prior to its entry of an order. The court emphatically stated that Congress was unwilling to subject the operation of a business to the risk of subsequent Commission condemnation. 503 F.2d at 325.

Yet, it may well be asked, what have the Commission and the Magistrate done in this case? They have done precisely what the FTC attempted to do in the Heater case, and have claimed the fact that Congress enacted the Proviso which allows the Commission to seek in proper cases a permanent injunction as authority. Congressional concern for proper notice, felt so deeply by the

members of Congress who adopted the FTC Act, was swept aside by the Seventh Circuit merely by virtue of the fact that one sentence was added to the FTC Act, which permits the FTC in proper cases to seek permanent injunctions. Such a conclusion is nothing short of absurd and unfair.

Another problem is inherent with the Seventh Circuit's position in this case. This problem is relevant to both the point that adopting the interpretation of the FTC and the Magistrate would itself be unfair, as well as the preceding point that such a dramatic statutory alteration could not have been Congress's intent. Specifically, the question is, what is the applicable standard by which a court should be

guided in evaluating whether to hold individual officers, shareholders, and directors liable for the acts of a corporation? Again, the Proviso only specifically permits permanent injunctions, and does not address the question about the standards to be applied in imposing personal liability on individuals. At least one court (one of the two relied on by the Magistrate) in grappling with this issue has acknowledged that the "elements of a redress action under §13(b) [§53(b)], are apparently a matter of first impression." FTC v. International Diamond Corp., 1983-2 Trade Cases, ¶65, 506 (N.D. Cal. 1983)(emphasis added). The 7th Circuit should note the use of the term "apparently" in the International

Diamond quotation. These are matters of such significant speculation that the few courts that are addressing these points are really not sure what the law is in this regard. In the International Diamond case, the court held that the applicable legal standard for imposing personal liability on individuals should be analyzed by reference to the mail fraud statute. 18 U.S.C. §1341. Similarly, a district court in Minnesota agreed with this conclusion. See FTC v. Kitco of Nevada, Inc., 612 F.Supp. 1282 (D.C. Minn. 1985). It should be noted, however, that nowhere is this issue discussed by Congress or in the FTC Act (going beyond the clear mandate of the Proviso in permitting the imposition of personal liabilities on individuals

sends a district court into unchartered waters). By what standards should a district court be guided? What are the legal limits that should be imposed upon this exercise? Can a corporation be enjoined from violating §45 if a deceptive act can be proved, but the individual owners only held responsible if such was tantamount to mail fraud? These, and other questions like them, are clearly raised if this court chooses to proceed on the assumption that in an action for a permanent injunction, a district court has the authority to impose personal liabilities upon individual owners of a corporation charged with improper conduct.

F. Adoption Of The FTC's Interpretation Of The Proviso Will Result In Bizarre Consequences

Finally, the FTC's interpretation of the §53(b) Proviso should be rejected because the interpretation will result in potentially bizarre consequences. Numerous people have gone on vacations sponsored by the Corporate Petitioners. In this case, however, the Commission is arguing for a restitution of monies to consumers, rescission of contracts, and other types of remedies. But this raises a critical question which was not addressed by the Seventh Circuit. What is to happen with regard to the consumers who have gone on trips and received in full the value of what they bargained for? What is to happen to those consumers who have not been deceived in any

way by any act or practice of the Corporate Petitioners? Those who have not and will not complain? Those who got what they bargained for? In a similar vein, does the action in this context have the effect of making all matters raised in the lower court res judicata, such that if a consumer brings an action against any of the Petitioners in a state court, the Petitioners cannot be brought to trial again there? See, e.g., FTC. v. Kitco of Nevada, Inc., 612 F.Supp. 1282, 1296 (D.Minn. 1985). If not, then the Magistrate by adopting the interpretation of the Proviso urged by the FTC, could put the Petitioners in the anomalous situation of, on the one hand, having been ordered to make restitution to consumers, while on the

other hand being subject possibly to suits for specific performance, and/or damages, filed by consumers in various state court actions. The uncertainty created by this scenario is created only because the Magistrate, at the urging of the FTC, by virtue of an erroneous interpretation of §53(b) of the Act, seeks to attempt to undo the effect of the Corporate Petitioners' contractual relations with customers. This, quite simply, is something which neither the Court nor the FTC is empowered to do.

To reiterate, it is the contention of the Petitioners in this case, that as a result of the Proviso, the FTC is empowered only to seek, and a district court grant, a permanent injunction; a district court is not empowered in a

permanent injunction suit to seek a freezing of assets, a restitution of monies which may or may not be owed to consumers, rescission of contracts or impose personal liability on the Individual Petitioners.

ISSUE II: WHETHER THE SEVENTH CIRCUIT ERRED IN HOLDING THAT THE DISTRICT COURT CORRECTLY ADJUDGED THE INDIVIDUAL DEFENDANTS LIABLE

Assuming arguendo, that the Corporate Petitioners are liable for restitution, the FTC must still prove that the Individual Petitioners are liable for the actions of the corporation. A prima facie case for individual liability was not made by the FTC, and the Petitioners had uncontested rebuttal on elements necessary to impose individual liabil-

ity. An abuse of discretion spans an entire family of review standards. Grant or denial of an injunction on purely factual matters is reviewed on a determination of clearly erroneous. If the decision is based on balance of harm, or mixed law and fact, then the review standard is if the decision is unreasonable. Review of purely legal determinations is plenary. Dynamics Corp. of America v. CTS Corp., 805 F.2d 705,709 (7th Cir. 1986). American Hospital Supply Co. v. Hospital Products Ltd., 780 F.2d 589, 594 (7th Cir. 1986). The District Court failed to correctly apply the law to the findings of fact when imposing liability. Additionally, the Court arrived at findings of fact which are clearly erroneous.

A. The District Court Applied an Erroneous Standard of Individual Liability.

The law on finding individual liability for restitution has been set forth in three cases. FTC v. Kitco of Nevada, Inc., 612 F. 28 Supp. 1282 (D. Minn. 1985); FTC v. International Diamond, 1983-2 Trade Cases (CCH) 65,506 (N.D. Cal. 1983); FTC v. Atlantex Assoc., 1987-2 Trade Cases (CCH) ¶67,788 (S.D. Fla. 1987). The original standard had four required elements:

(1) that the individuals knew that their companies or one or more of their agents engaged in dishonest or fraudulent acts or practices;

(2) that the individual defendants either directly participated in the fraud or had the authority to control them; and

(3),(4) basically that the corporation is liable because of deception and consumer injury.

Kitco, 612 F.2d at 1292. Point (2) was further clarified so that direct participation was not necessary, but awareness plus failure to act within one's authority to control is sufficient. Atlantex, supra. It is therefore clear that imposition of liability involves the necessary elements of both knowledge and a failure to act. The FTC and District Court repeatedly asserted that motive and intent were irrelevant. However, the above standard clearly includes the elements of knowledge and a failure to act. These are merely variations on the traditional concepts of intent.

The cases cited by the FTC for the

proposition that intent to deceive is not a necessary element of an FTC violation all dealt with cease-and-desist orders or injunctions. In such cases, corporations and individuals are being directed to refrain from certain conduct. This case involves holding an individual liable for monetary restitution. In this situation, a finding of bad faith or intent to deceive should be required before imposing such a sanction. See Porter & Dietsch, Inc. v. FTC, 605 F.2d 294, 309 (7th Cir. 1979) (extent of party's culpability should affect nature of relief granted). District courts have held that to find an individual liable for restitution under § 53(b), the FTC must prove that the defendant knew or should have known

that the conduct was dishonest or fraudulent. See FTC v. International Diamond Corp., 1983-82 Trade Cas. (CCH) § 65,725 at 69,706-07 (N.D. Cal. 1983) (to hold defendant liable for redress under §53(b), defendant's activity must rise to the level of fraud or dishonesty); FTC v. Kitco of Nevada, Inc., 612 F.Supp. 1282, 1292 (D. Minn. 1985) (to obtain monetary equivalent of rescission, FTC must prove defendant had knowledge that corporation or its agents "engaged in dishonest or fraudulent conduct"); FTC v. Atlantex Assoc., 1987-2 Trade Cas.(CCH) ¶67,788 at 59,255 (S.D. Fla. 1987).

Historically, since the creation of the FTC, businesses were put on notice that their conduct was improper through

the cease and desist procedure of §57 of the FTC act. Corporate directors and corporations were not liable for monetary damages unless they later knowingly violated a prior order. By requiring a finding of fraud to impose liability under §53b, a standard similar to that existing under §57 is retained. Businessmen and companies who unknowingly use language in a sales script found to be deceptive would be given a chance to remedy the situation on their own. This Court should determine that a finding of intent to deceive or bad faith is required before monetary rescission or restitution may be awarded against an individual under 15 U.S.C. §53(b). Accordingly, the District Court and Seventh Circuit erred in imposing the

wrong legal standard of liability on the Petitioners.

B. The District Court's Findings Of Fact Supporting The Judgment Are Clearly Erroneous.

Even if the Court did not misapply the law to the facts, the Court was clearly erroneous on several findings of fact necessary to prove essential elements of individual liability. The Court upholds the findings of knowledge by stating that "McCann and Weiland designed and on a day-to-day basis oversaw the sales operation." (FF p.32). However, there is no evidence on the record that Jim Weiland was involved with the day-to-day sales operations. Instead the testimony indicates that he primarily worked with Amy and did administrative duties. Jim Weiland did

not exercise control over the marketing operations. Tom McCann was responsible for the sales offices (T.15P.651,652, T.16P.870). The Seventh Circuit erred in affirming the District Court's finding that Jim Weiland was individually liable because there is no evidence to support that finding and the District Court's judgment against Jim Weiland should be set aside.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioners, Amy Travel Service, Inc., Resort Performance, Inc., James F. Weiland, and Thomas P. McCann, II, respectfully request the following relief:

(1) That this Court grant Peti-

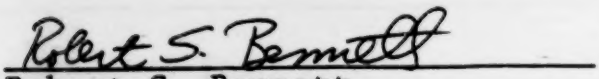
tioner's Petition for Writ of Certiorari;

(2) That the Seventh Circuit's opinion affirming the judgment of the District Court be reversed;

(3) That the District Court's Final Order be reversed in its entirety or, in the alternative, that the part of the Final Order which award monetary damages in the form of rescission and restitution against Petitioners be reversed and set aside; and

(4) In the alternative, that the part of the District Court's Final Order which awards monetary damages against the individual Petitioners, James F. Weiland and Thomas P. McCann, II be reversed and set aside.

RESPECTFULLY SUBMITTED,
BENNETT & BROOCKS



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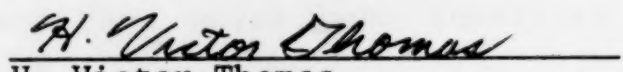
ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that three true copies of the foregoing corrected Petition for Certiorari was served via U. S. Mail to Mr. Melvin Orleans and Mr. Larry Hodapp, Attorneys at Law, Federal Trade Commission, 6th and Penn. Avenue, N.W., Washington, D.C. 20580, and three copies of the corrected Petition were served on the Solicitor General, Department of Justice, Washington, D.C. 20530 on this the 9th day of August, 1989.



H. Victor Thomas

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1989

AMY TRAVEL SERVICES,INC.et al.	§	
	§	
Petitioners	§	
v.	§	NO. _____
	§	
FEDERAL TRADE COMMISSION	§	
	§	
Respondent	§	

AFFIDAVIT OF H. VICTOR THOMAS

STATE OF TEXAS §
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared H. Victor Thomas, known to me, who upon oath deposed and said:

"My name is H. Victor Thomas and I reside at 4620 Pin Oak Ln., Houston, Texas 77401. I am over the age of eighteen and have never been convicted of a felony.

"Three copies of the Petition for Writ of Certiorari were mailed to Melvin Orleans and Lawrence Hodapp at the

Federal Trade Commission, 6th St. and Pennsylvania Ave., N.W., Washington, D.C. 20580 on July 17, 1989 and three copies of the corrected Petition were mailed to the above parties and address on August 9, 1989. All mailings were by the U.S. mail, first-class, postage prepaid.

"Three copies of the corrected Petition for Writ of Certiorari have also been mailed to the Solicitor General, Department of Justice, Washington, D.C. 20530 by depositing in the U.S. mail by first-class postage prepaid.

"Further Affiant Sayeth Not.

"I state on penalty of perjury that the foregoing statement is true and correct to the best of my belief and knowledge."

Executed on this 9th day of August, 1989.

By: H. Victor Thomas

H. Victor Thomas

SUBSCRIBED AND SWORN TO BEFORE ME, the above Affidavit of H. Victor Thomas on the 9th day of August, 1989, to certify which witness my hand and official seal of office.

Gaylynn Lowery

Notary Public in and for the State of Texas

My Commission Expires:

7-10-91